IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

CWP Nos. 699 of 2003
&
CWP No. 1023 of 2003.

Judgment reserved on: 20.3.2007

Date of Decision: April 27, 2007

CWP No. 699 of 2003.

M/s Sikand & Company … Petitioner.

Versus.

State of H.P. & others. …. Respondents.

CWP No. 1023/03

Satish Kumar …. Petitioner

Versus.

M/s Sikand & Co & anr. …. Respondents.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice Surinder Singh, Judge.

Whether approved for reporting?

For the Petitioner: Mr. R.L.Sood, Sr.Advocate with Ms. Sanjivni Sud, Advocate.

For the Respondents: Mr. M.S.Chandel, Advocate General with Mr. R.M.Bisht, Deputy Advocate General for respondent No.1.

Mr. Shrawan Dogra, Advocate, for respondent No.3.

Deepak Gupta, J.

These two writ petitions are being disposed of by this common judgment since they arise out of the same award. One writ petition has been filed by the workman and second by the employer challenging the award of the Labour Court, Shimla in Reference No. 56 of 1994 decided on 26.5.2003.

The undisputed facts are that the workman was employed in the Nagrota Bagwan office of the employer on 10.2.1983 at a monthly salary of Rs. 850/- along with benefits such as bonus, provident fund, gratuity, rent free accommodation etc. The case of the workman is that he was assured that he would be permanently posted at Nagrota Bagwan. On 23.11.1993, the employer transferred the services of the workman and a letter was sent to him transferring him to Barmana in District Bilaspur, HP. He made a representation against the order on the ground that he was advised by the doctor not to a take long journey. Since the workman did not join his service, the employer terminated his services vide letter dated 18.1.1994. This termination is challenged on the ground that no notice had been given to the workman and no retrenchment compensation was paid to him.

Initially, an ex-parte award was passed in favour of the workman on 9.11.1994. This award was challenged by the employer in this Court by filing a writ petition being CWP No. 1398/95. The said writ petition was decided on 25.4.1996 and the employer was permitted to file an appropriate application for setting aside ex parte proceedings before the Labour Court. The Labour Court rejected the application of the employer for setting aside ex-parte proceedings and this order was challenged in CWP No.9/97. This writ petition was allowed on 18.2.2001 and the ex parte award

was set aside on certain conditions. After remand, the employer filed reply raising various objections. It was argued that the petitioner was not a workman and the petition under the Industrial Disputes Act was not maintainable. It was further pleaded that the petitioner had abandoned his job. It was stated that the workman on being transferred to Barmana, did not report for duty at the new place of posting and as such abandoned his job. It was, however, admitted that the services of the petitioner were terminated on 18.1.1994.

On the pleadings of the parties, the learned Labour Court framed the following issues:-

1. "Whether the petitioner has been terminated in violation of the Industrial Disputes Act, as alleged? OPP
2. Whether the petition is not maintainable as petitioner is not a workman as alleged? OPR
3.
4. Whether respondent is a partnership concern as alleged, if so its effect? OPR
5. Whether petitioner has left the job voluntarily as alleged? OPR
6. Whether petitioner is gainfully employed as alleged. If so its effect? OPR
7. Relief. "

The learned Labour Court decided issues No. 1,2, 4 and 5 in favour of the workman. The learned Labour Court directed that the petitioner be reinstated in service w.e.f. 19.1.1994. However, he was held entitled to back-wages only from 19.1.1994 i.e. the date of termination of service to 17.3.1997. The reason for limiting the back-wages was that in the earlier writ petition No.9/97, this Court had passed an interim order on 17.3.1997 in CMP No. 33/97 staying the award on the condition that the

workman would be posted either at Nagrota Bagwan or at Solan as decided by the employer. The employer posted the workman at Solan but he left after one day only. Thereafter the workman moved an application that he could not join at Solan since he is suffering from Bronchial Asthma and the earlier order be modified. This application being CMP No.669/98 was rejected and the Division Bench of this Court came to the following conclusion:-

> "We have carefully considered the submissions of the learned counsel appearing on either side. The order dated 17.3.1997 has been passed after hearing the learned counsel appearing on either side. No such drawbacks or disabilities now claimed to have been faced with by the applicant, have ever been whispered at the time when the alternative places have been stipulated and the right of choosing and posting out of the two places, has been allowed to be with the management. We are not impressed b y the materials placed on record by the applicant to substantiate his claim for the modification and in our view the least said about it, is the better. Consequently, we see no merit in the application for modification and the same shall stand rejected."

The order passed by the learned Labour Court has been challenged in CWP No. 669 of 2003 and by the workman in CWP No. 1023 of 2003. According to the employer, the award of the labour Court is incorrect and the main challenge is on the ground that the employee/respondent is not a workman and was working in managerial or supervisory capacity. It was also averred that the respondent/employee had abandoned the job and therefore could not have been given any benefit. It has also been pleaded that even after the decision of the Industrial Tribunal, the workman was asked to join at Solan but he has not joined and, therefore also he is not entitled to any relief. On the other hand

the case of the workman is that he should be paid back wages which have been denied to him by the Labour Court.

The first question to be decided is whether the employee is a workman within the meaning of Workmen's Compensation Act. The definition of workman is contained in **Section 2(s)** of the Industrial Disputes Act, 1947 which reads as follows:-

"2(s) " workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purpose of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person –

(i) who is subject to the Air Force Act, 1950 (45 of 1950) or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison, or

(iii) who is employed mainly in a managerial or administrative capacity, or

(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

According to the employee, he was doing the work of clerical nature only and therefore falls within the definition of workman. On the other hand, the stand of the management is that the employee was engaged as Assistant Manager and he was employed in managerial capacity and was doing the job of a Manager and therefore, he cannot be treated to be a workman.

Ex.PA is the appointment letter of the workman. It does not spell out the designation of the workman. In the statement of claim, the petitioner has averred that he was initially appointed as Acting Assistant Manager. He also made allegations that he did work in various capacities and promoted the business of the firm at Nagorta Bagwan. There is some evidence to show that on certain occasions cheques were signed by the workman.

We have heard the matter in detail and have also gone through the record of the learned tribunal. From the record, it appears that the employer was maintaining a small establishment at Nagrota Bagwan. The workman in his cross-examination admitted that he was transferred from Nagrota Bagwan to Barmana but he did not join there. He admits that he had not challenged the order of transfer in any other Court. According to him, at Nagrota Bagwan, the office was being looked after by Col. Parmar who was the Manager. The employee in his statement has clearly put up a case that he was a workman.

RW1 is the Senior Assistant from the State Bank of India who has stated that the bank had received instructions from Company i.e. M/s Sikand and Company, Nagrota Bagwan, authorizing the employee to operate the bank account. He also produced two cheques dated 16.11.1993 and 17.11.1993 signed by the employee. In cross-examination, he has admitted that the employee Satish Kumar had operated the bank account only for a limited period and otherwise the account was being operated by the Manager of M/s Sikand and Company at Nagrota Bagwan.

RW 2 Anil Sikand is one of the Managing partners of the firm M/s Sikand and Company. He states that the employee was supervising the entire office work at Nagrota Bagwan, where he set up a new out-let and purchased land for the same. He states that in the absence of Col.

Parmar, the employee used to act as Manager of the firm and used to check attendance of the workers, manage the petty cash and disburse salary etc. In cross-examination, he admits that the employee was not authorized to appoint, terminate or initiate departmental proceedings against any worker employed in the said outlet. He admits that Nagrota Bagwan outlet became operative in 1988 and Col Parmar was appointed as Branch Manager on 21.3.1988.

RW3 is one Pancham Dass, Mechanic of M/s Sikand & Company. According to him, the employee was Assistant Manager and used to disburse salary to the employees and also used to mark the attendance of the employees. According to him, the accounts used to be maintained by Col. Parmar and in his absence by the employee Satish Kumar. In cross- examination, he states that the employee Satish Kumar in his capacity as Store In-charge used to issue spare parts etc. and used to issue bin cards and maintain registers in this behalf. He also admits that Kirpal Singh was the work Manager and used to work in the Company from the very beginning. According to him, in the absence of Col. Parmar, Satish Kumar used to sanction the leave to the employees. He has also admitted that the employee was performing manual duties in his branch.

RW4 is Kirpal Singh, Branch Manager of M/s Sikand and Company, Nagrota Bagwan. According to him, in his absence Satish Kumar used to lookafter the duties of the Manager. He has admitted that Satish Kumar was the Incharge of Store and designated as such. According to him, he was second in command to the branch manager. He has categorically stated that the main nature of duties of Satish Kumar was to obtain spare parts and take the same in his charge, issue/sell spare parts, make entries of the same in the register and to maintain accounts regarding sale and purchase of spare parts.

RW5 Bansi Lal has stated that in the absence of the Branch Manager, Satish Kumar used to sanction the leave of the employees.

A number of documents have been filed by both the parties. After going through the entire evidence, it is proved that basically the employee was a workman though he may have been given the high sounding designation of Assistant Manager. It is apparent that his main duties were as Store In charge in which capacity he used to purchase, sell and hand - over spare parts and maintain the record thereof. In such capacity he also maintained bin cards and cardex register. It is also apparent that in the absence of the Branch manager, the petitioner/employee at times was doing supervisory functions. However, we are of the considered view that merely because he may have discharged supervisory and managerial functions off and on, this cannot detract from the basic fact that he was working as Store Incharge. In our opinion, the store incharge has to be treated as a workman and cannot be treated to be working in managerial or supervisory capacity.

The apex Court in **Arkal Govind Raj Rao v. Ciba Geigy of India Ltd. Bombay,** AIR 1985, SC 985 held as follows:-

> "Where an employee has multifarious duties and a question is raised whether he is a workman or some one other than a workman the court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basis duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of the person. The definition of the expression workman clearly shows that the person concerned would not cease to be a workman if he performs some supervisory

duties but he must be a person who must be engaged in a supervisory capacity."

The learned Tribunal has dealt with this question in detail and we feel that the findings recorded by the learned Tribunal holding the employee to be a workman are supported by evidence and material on record and cannot be set aside in a writ jurisdiction.

The contention of the employer that the workman had abandoned his job cannot also be accepted. The workman was posted at Barmana. He admittedly did not join there and insisted that he should be given fresh appointment on fresh terms and conditions. The employer was free to initiate departmental proceedings against the workman for not joining his duties at the new place of posting. However, this cannot be held to be abandonment of job.

With regard to back wages, we are of the considered view that the workman is not entitled to any back wages and the order of the learned Tribunal is correct. This Court in the earlier writ petition had directed reinstatement of the workman and he was directed to be posted only at Solan or at Nagrota Bagwan. He was posted at Solan but after joining, he left immediately. He did not report for duty and applied for modification of the order. Even after the application for modification was rejected by this Court, the workman did not agree to join his duties at Solan. Therefore, he is not entitled to back wages for the period.

The employer has submitted that even after the award was passed by the learned Tribunal, the workman has not joined his duties at Solan as directed. In this regard, the stand of the employee is that the tribunal has directed reinstatement of his service and therefore, he should be reinstated at the place from which his services were terminated.

Shri Shrawan Dogra, learned counsel for the employee has placed reliance on the judgment of Bombay High Court in **Vittal Venkatesh and**

others versus. **Patheja Forging and Auto Parts MFRS (P) LTD,** 1993 (66) F.L.R 826.

We have some reservations with regard to the correctness of this judgment. Each case has to be decided on its own facts. Supposing a Court finds that the services of a workman were wrongly terminated and he be reinstated in service, obviously, the employer is bound to obey the orders of the Court. A situation may arise where there is no post vacant at the place where the services of the employee were terminated or may be the employer has stopped his business at such place. In such cases, the employer would be justified in offering fresh service at a new place. Even in the present case, we find that the attitude of the workman is obstructive and he obviously does not want to work. This Court had ordered that he should join his duty either at Nagrota Bagwan or at the place where his employer posts him. He was posted at Solan and his reinstatement in these circumstances had to be at Solan. No employee can dictate terms that he should be posted at any particular place. Even after the order was passed by the Labour Court, he was asked to report for duty at Solan but has not joined and insists that he be posted at Nagrota Bagwan. The workman cannot be permitted to hold his employer to ransom. Obviously, if he has not joined, he is not entitled to any wages for the period he has not worked on the principle of 'No Work, No Pay'. The employer shall also be at liberty to take action in accordance with law for the failure of the workman to join his duties at Solan

In view of the above discussion, both the writ petitions are disposed of in the aforesaid terms. No order as to costs.

(Deepak Gupta), J.

April 27, 2007. (Surinder Singh). J
s.